IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, JR. SANDRA R. NOE, and CLAIRE M. PALMER, Individually, and as Representatives of plan participants and plan beneficiaries of VERIZON's PENSION PLANS involuntarily re-classified and treated as transferred into IDEARC's PENSION PLANS, Plaintiffs, vs. VERIZON COMMUNICATIONS, INC., VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES, VERIZON MANAGEMENT PENSION PLAN, IDEARC EMPLOYEE BENEFITS COMMITTEE, IDEARC PENSION PLAN FOR MANAGEMENT EMPLOYEES, and IDEARC PENSION PLAN FOR COLLECTIVELY BARGAINED EMPLOYEES, Defendants.	§ §	CIVIL ACTION NO. **3:09-cv-2262-G**

PLAINTIFFS' OPPOSITION TO SUPERMEDIA DEFENDANTS' MOTION TO DISMISS

DATED this 30th day of March, 2010.

Respectfully submitted,

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PLAINTIFFS' OPPOSITION TO SUPERMEDIA DEFENDANTS' MOTION TO DISMISS

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their brief in opposition to Docket No. 22, the SuperMedia Defendants' motion to dismiss.

I. Background

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (ollectively, "plaintiffs"), filed this case against the Verizon Defendants and the Idearc/SuperMedia Defendants on behalf of themselves and others similarly situated, alleging that their suit should be certified as a class action. On January 6, 2010, plaintiffs filed their "Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 6).

The plaintiffs' claims arise out of Verizon Defendants' actions taken during November-December 2006 when plaintiffs and a putative class of several thousand retirees were involuntarily transferred out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc, Inc., now known as SuperMedia Inc. [1] The involuntary transfer of plaintiffs and putative class members proved to be an economic detriment to the retirees and their beneficiaries. The transferred retirees suffered significant loss of retiree benefits not suffered by tens of thousands of retirees who remained enrolled in Verizon sponsored pension and employee benefit plans. (Docket No. 6, Amended Complaint at ¶¶ 49, 66, 150).

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[1] On March 31, 2009, Idearc, Inc. and its domestic subsidiaries filed within the Dallas Division of this District voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. As of January 4, 2010, Idearc emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (Docket No. 6, Amended Complaint at ¶¶ 19, 62)

In their Amended Complaint, plaintiffs have asserted six separate claims for relief and each count is briefly summarized in the following paragraphs.

In Count One, plaintiffs contend pension plan administrators (both Defendant Verizon EBC and Defendant Idearc/SuperMedia EBC) breached fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), which statutory provision mandate that fiduciaries act in the best interests of plan participants. (*Id.* at ¶ 101). Pension plan administrators denied many of plaintiffs' requests for plan documents and other pension plan information, all of which information was necessary for plaintiffs' internal administrative claims asserted before filing this civil action. (*Id.* at ¶ 99). Plaintiffs contend that the pension plan administrators' evasive and uncooperative stance thwarted Congress' intent behind ERISA that individuals, such as plaintiffs, have access to information necessary to determine the credibility of their claims for pension benefits. (*Id.* at ¶ 88). Plaintiffs contend that they can demonstrate exceptional circumstances which justify expansion of the pension plan administrators' respective duties to make required disclosures to plaintiffs beyond the matters specifically listed in ERISA Section 104(b)(4). (*Id.* at ¶ 95). Plaintiffs contend that pension plan administrators' failure to produce requested documents and to make requested disclosures during plaintiffs' internal administrative claims process was a violation of applicable pension plan rules requiring disclosure of information relevant to plaintiffs' internal claims. (*Id.* at ¶ 100). Pursuant to ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3), plaintiffs ask this court to grant appropriate equitable relief including injunctive relief ordering both Defendant Verizon EBC and Defendant Idearc/SuperMedia EBC to disclose the information and produce the documents each has in its respective possession that is responsive to plaintiffs' request for information enumerated in

paragraph 86 of the Amended Complaint, which paragraph reiterates what plaintiffs set forth in a February 4, 2009 demand letter. (*Id.* at ¶ 103, Prayer at ¶ D). Plaintiffs also seek disclosure of the full administrative record, including all letters received by said defendants from other retirees and the responsive letters sent to those retirees. (*Id.*).

In Count Two, plaintiffs contend pension plan administrators (both Defendant Verizon EBC and Defendant Idearc/SuperMedia EBC) violated ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), by refusing to honor within 30 days of plaintiffs' several written requests for pension plan documents, including instruments under which plans are established or operated. (*Id.* at ¶ 105). By way of example, pension plan administrators refused to honor plaintiffs' request for production of the pension plan's investment policy guidelines, which requested documents are "instruments" under which the pension plan is "established or operated," within the meaning of ERISA Section 104(b)(4). (*Id.* at ¶ 106). Pursuant to ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), plaintiffs request this court assess penalties up to $110 a day against both Defendant Verizon EBC and Defendant Idearc EBC for their respective failure or refusal to provide plaintiffs requested documents and instruments under which the pension plans are established or operated. (*Id.* at ¶¶ 110-112, Prayer at ¶¶ B-C).

In Count Three, plaintiffs contend Defendant Verizon EBC violated ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), the duty to comply with pension plan document rules. (*Id.* at ¶ 136). Plaintiffs contend that all actions taken with respect to pension assets and retired plan participants had to be in exact accordance with then existing governing plan terms and rules, but that defendant acted contrary to the controlling terms and rules. (*Id.* at ¶ 128). Plaintiffs invoke *Kennedy v. Plan Administrator for DuPont Savings and Investment*, 129 S.Ct.

865 (2009), wherein the Supreme Court confirmed that ERISA provides no exception to the plan administrator's duty to act in accordance with existing plan documents and stated rules. (*Id.* at ¶ 129). Plaintiffs contend that Verizon EBC's involuntary reclassification and removal of plaintiffs and the putative class of retirees from Verizon sponsored pension plans as of November 17, 2006 was action taken in violation of the retirees' contractual rights under the Verizon pension plans and action taken in violation of controlling pension plan terms and rules. (*Id.* at ¶ 134). Plaintiffs seek a declaration from this Court that Defendant Verizon EBC failed to act in compliance with Verizon's pension plan documents rules and violated ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). (*Id.* Prayer at ¶ G.2).

In Count Four, plaintiffs seek appropriate equitable relief against the pension plan sponsors and plan administrators. Plaintiffs contend that the pension assets, if any, that Verizon may have transferred to Idearc/SuperMedia were excess or surplus pension assets not earmarked or tied to any liabilities. (*Id.* at ¶ 138). Pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), plaintiffs request this court grant them appropriate equitable relief, including a declaration that the transfer of surplus assets, whenever it did occur, did not serve to change the retirees' status and did not extinguish any plaintiff's or putative class member's rights to payment of benefits from Verizon's pension plans. (*Id.* at ¶ 138, Prayer at ¶ G.3). Plaintiffs contend the December 22, 2006 pension plan amendments were illegally applied retroactively and they request a declaration that the December 22, 2006 plan amendments are null and void. (*Id.* at ¶ 139, Prayer at G.3). Plaintiffs seek injunctive relief rescinding Verizon's reclassification of plaintiffs and the putative class and an order requiring all retirees be restored to their former status as participants and beneficiaries enrolled in Verizon's

pension and welfare plans and that they be made whole. (*Id.* at ¶140, Prayer at ¶ G.4). Plaintiffs request an order requiring Idearc/SuperMedia Defendants transfer back to Verizon pension and welfare plans plaintiffs and all putative class members. (*Id.*, Prayer at ¶ G.5).

In Count Five, plaintiffs contend that Verizon Defendants violated ERISA Section 510, 29 U.S.C. § 1140, when plaintiffs and putative class members were expelled from Verizon's pension plans and involuntarily transferred into Idearc/SuperMedia's pension plans. (*Id.* at ¶ ¶ 145-148). Plaintiffs contend that when they were expelled from continued participation in Verizon's pension plans, Verizon Defendants were motivated in part to interfere with the retirees' vested rights to continue receiving payment of Verizon pension benefits, as well as non-protected retiree welfare benefits. (*Id.* at ¶ ¶ 143, 146). Plaintiffs seek appropriate equitable relief under ERISA Section 502(a)(3), including an order directing all defendant parties restore all involuntarily transferred retirees into Verizon's pension plans and that plaintiffs and putative class members be made whole. (*Id.* at ¶ ¶ 150, Prayer at ¶¶ G.4-G.5).

In Count Six, plaintiffs seek payment of benefits from Verizon's pension plans. Plaintiffs assert their ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), claim as an alternative claim to their ERISA Sections 502(a)(2) and (a)(3) based claims, should the Court not grant full relief under those claims. (*Id.* at ¶ 152). Plaintiffs contend that Verizon vested pension plan benefits due and payable under the terms in existence before December 22, 2006 were not actually provided to plaintiffs and putative class members. (*Id.* at ¶ 157). Plaintiffs seek for themselves and the putative class members benefits payable under the unaltered terms and plan language in existence before December 22, 2006. (*Id.* at ¶ 158, Prayer at ¶ H).

The Court has jurisdiction of each claim for relief based upon the civil enforcement

provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a)(1), 1132(a)(2), 1132(a)(3), 1132(e)(1) and 1132(f), and upon 28 U.S.C. § 1331.

On February 9, 2010, the parties filed a stipulation and agreement that SuperMedia, Inc. need not remain in the case as a named defendant party since no monetary damages are being sought against SuperMedia, which entity has agreed to abide by any equitable or injunctive relief to be ordered by the Court. (See Docket No. 15, "Stipulation of Dismissal of Idearc, Inc. n/k/a SuperMedia, Inc. Under Federal Rule of Civil Procedure 41(a)(1)(ii))". On that same date, the Court entered an order dismissing without prejudice SuperMedia, Inc. (Docket 17, Order).

On March 10, 2010, the remaining SuperMedia Defendants filed a motion to dismiss under Rule 12(b)(6) of the Federal Rule of Civil Procedure contending plaintiffs have failed to state any claim against said defendants. (Docket No. 22).

II. ARGUMENT

A. Rule 12(b)(6) Motion to Dismiss Standard

The SuperMedia Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). "To survive a Rule 12(b)(6) motion, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)), *cert. denied*, __, U.S. __, 128 S.Ct. 1230 (2008). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 127 S.Ct. at 1965). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (internal quotation marks omitted)

(quoting *Martin K. Eby Construction Company v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).

In their Rule 12(b)(6) motion to dismiss, SuperMedia Defendants contend the SuperMedia pension plans should not be named defendants on the single grounds that no wrongdoing is alleged against the SuperMedia pension plans. Also, SuperMedia Defendants contend plaintiffs have stated no claim for relief against SuperMedia EBC, the plan administrator for SuperMedia's pension plans. Plaintiffs' following response in opposition proves the motion to dismiss should be denied.

B. The SuperMedia Pension Plans Are Named As Necessary Defendant Parties

In this case, plaintiffs contend that Verizon's reclassification and transfer of the retirees from participation in Verizon's pension plans into SuperMedia's pension plan should be rescinded and that all plaintiffs and putative class members be restored to their former status as participants in Verizon's pension and welfare plans and that they be made whole. (Amended Complaint at ¶ 140). Plaintiffs seek an order directing all defendant parties restore all involuntarily transferred retirees into Verizon's pension plans. (*Id.* at ¶ 151, Prayer at ¶ G.4). In order to get complete relief - removal from SuperMedia's pension plan and restoration into Verizon's pension plans - plaintiffs have added the SuperMedia pension plans as necessary defendant parties. (*Id.* at ¶¶ 22-23).

ERISA Section 502(d)(1), 29 U.S.C. § 1132(d)(1), states "[a]n employee benefit plan may sue or be sued under this subchapter [referring to Subchapter I] as an entity," and does not limit the forms of relief that may be sought against a plan. Subchapter I of ERISA provides that a plan participant or beneficiary may sue for payment of benefits and a plethora of appropriate

equitable relief. ERISA Sections 502(a)(1)(B), (a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(1)(B), (a)(2) and (a)(3). It is beyond dispute that "ERISA permits suits to recover benefits only against the Plan as an entity ..." *Jass v. Prudential Health Care Plan, Inc*., 88 F.3d 1482, 1490 (7th Cir.1996) (quoting *Gelardi v. Pertec Computer Corp*., 761 F.2d 1323, 1324 (9th Cir.1985)). Appellate courts have warned lawyers that in ERISA suits for benefits, the applicable plans should be named as a defendant. *Mein v. Carus Corp*., 241 F.3d 581, 584 (7th Cir .2001); *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 509 (2d Cir. 2002). The cases are too numerous wherein aggrieved claimants have sought to be *included* in an employee benefit plan and paid various plan benefits. Counsel for plaintiffs could find no published cases wherein retiree plan participants have specifically sought to be *removed* from a particular pension plan, the situation we have in this litigation. However, in the later case, the plans are no less necessary to be named as parties for the relief sought to be effected.

Pragmatically, the SuperMedia pension plans are simply absolutely necessary parties to this litigation because plaintiffs seek to be removed from SuperMedia sponsored pension plans and restored back into their former Verizon sponsored pension plans. In this case, the Court needs jurisdiction over the SuperMedia sponsored pension plans in order to grant complete relief. The SuperMedia pension plans are necessary parties under Rule 19(a), Fed.R.Civ.Proc., which states, in relevant part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise

inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.Proc. 19(a). Rule 19 provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. *HS Resources, Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir.2003).

The SuperMedia pension plans are not disinterested third party bystanders. There can be no doubt that the SuperMedia pension plans now paying benefits to plaintiffs and the putative class claim an interest in maintaining the retirees' enrollment together with the hundreds of millions of dollars of surplus pension assets Verizon transferred to the SuperMedia pension plans. In order to grant complete equitable relief in this action, the Court is asked to order all retirees and their beneficiaries removed from the SuperMedia pension plans and transferred back into Verizon sponsored pension plans. This reverse transaction will require the full cooperation of the SuperMedia pension plans which maintain current contact information for all putative class members. Thus, SuperMedia pension plans are necessary parties to this litigation and they should not be dismissed from this case. Accordingly, SuperMedia pension plans' Rule 12(b)(6) motion to be dismissed should be denied.

C. Plaintiffs Have Stated a Claim Against SuperMedia EBC for Violation of ERISA § 104(b)(4)

In Count Two of the Amended Complaint, plaintiffs contend that both Defendant Verizon EBC and Defendant SuperMedia EBC, as pension plan administrators, failed or refused to honor within 30 days of plaintiffs' written request for copies of pension plan documents, including instruments under which the pension plans are established or operated, thereby violating

ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4).[2] (Docket 6, Amended Complaint at ¶¶ 105-112). In response to Count Two, Defendant Verizon EBC filed an Answer with a general denial. (Docket No. 20). Defendant SuperMedia EBC contends plaintiffs' Count Two should be dismissed for failure to state a claim. (Docket No. 22, at pp. 11).

By way of example of responsive documents not produced by Defendant SuperMedia EBC, plaintiffs pled in the Amended Complaint that they had requested production of the pension plan's investment policy guidelines because that type of document constitutes an "instrument" under which the pension plan is "established or operated," within the meaning of ERISA Section 104(b)(4). (Docket No. 6, Amended Complaint at ¶ 106). Despite Plaintiffs' written requests, both Defendant Verizon EBC and Defendant Idearc EBC, in bad faith, refused and continue to refuse to provide plaintiffs any of the pension plans' respective investment policy guidelines. (*Id.* at ¶ 107)

Defendant SuperMedia EBC contends all documents withheld from plaintiffs are not considered by the courts as encompassed by ERISA Section 104(b)(4). In making that argument, Defendant needlessly lists requested documents that are not the basis for Count Two, plaintiffs' claim that there was a violation of ERISA Section 104(b)(4). Therefore, plaintiffs address hereinbelow the several categories of documents they contend are encompassed by ERISA Section 104(b)(4) and not produced to plaintiffs.

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[2] ERISA Section 104(b)4) provides in pertinent part:

> The administrator shall upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b)(4).

1. The requested Form 5500s and funding and actuarial reports are encompassed by ERISA Section 104(b)(4)

In their letter dated February 4, 2009, all plaintiffs requested Defendant SuperMedia to disclose information so that Plaintiffs could determine exactly when and whether or not Verizon transferred sufficient funds to support Idearc's pension obligations to the transferred retirees. Plaintiffs requested "actuarial studies, funding projections, estimates and final reports concerning pension assets expected to be transferred and confirming the transfer of assets to Idearc for payment of pension liabilities." (Docket No. 6, Amended Complaint at ¶ 54). This request concerns the formal establishment and funding of the pension plans. In a prior request sent in August 1998, plaintiffs Sandra Noe and Claire Palmer requested Form 5500s and other plan documents and they contend Defendant SuperMedia EBC did not fully respond. (*Id.* at ¶ 51).

Defendant SuperMedia EBC over simplifies plaintiffs' request for funding information and argues "[a]ctuarial reports do not qualify as 'other instruments under which the plan is established or operated.'" (Docket No. 23, at p. 8). With respect to said defendants characterization of plaintiffs' request as seeking only "actuarial reports," the appellate courts are split about whether such documents are encompassed by ERISA Section 104(b)(4). In *Bartling v. Fruehauf Corp*., 29 F.3d 1062, 1070 (6th Cir. 1994), the appellate panel concluded that actuarial reports are indispensable to the operation of the plan and, as such, they are "instruments under which the plan is ... operated," which must be disclosed upon request under the plain language of § 1024(b)(4)). On the other hand, in *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146 (2nd Cir. 1997), the appellate panel ruled that actuarial reports need not be disclosed because they are not specifically listed in ERISA Section

104(b)(4).

However plaintiffs' requests were not so limited. Plaintiffs' requests encompassed the Form 5500 which is required to report annually the transfer in and out of assets to other pension plans.[3] Form 5500 is a report filed with U.S. Department of Labor, the Internal Revenue Service, and Pension Benefit Guaranty Corp by all ERISA-qualified (i.e., tax- qualified) pension plans. Form 5500 contains information such as interest rate assumptions, actual rates of return, and plan funding status. *U.S. v. Coyle*, 63 F.3d 1239, 1242 (3rd Cir. 1995). Clearly, a report such as Form 5500 is required to be produced under ERISA Section 104(b)(4) ("latest annual report"), 29 U.S.C. § 1024(b)(4).

While not required by Rule 8(a) of the Federal Rules of Civil Procedure to specifically plead and identify each requested document not produced, plaintiffs pled generally that with respect to requested Form 5000s and other plan documents, "Defendant Idearc EBC failed to timely produce some responsive documents and some responsive documents have not yet been produced." (Docket No. 6, Amended Complaint at ¶ 51). Plaintiffs further pled that "[n]either Defendant Verizon EBC nor Defendant Idearc EBC fully complied with all of Plaintiffs' aforesaid ERISA Section 104(b)(4) document requests and, to date, much of the requested information has not been disclosed to Plaintiffs. The failure or refusal to disclose the requested information and documents was a breach of ERISA fiduciary duty owed to Plaintiffs.' (*Id.* at ¶

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[3] Plaintiffs pled in the Amended Complaint that contrary to all defendants' position about there being a transfer of assets from Verizon's pension plans into SuperMedia's pension plans during year 2006, the Form 5500 annual reports disclose there was no such transfer of assets during year 2006. (Docket No. 6, Amended Complaint at ¶ 34). Verizon Defendants have admitted "the Idearc pension plans to which assets were transferred were not identified in response to question 5b of Part IV of Schedule H of the Form 5500s" and that "the responses to question 5b of Part IV of Schedule H are in the process of being amended. . ." (Docket No 20, Answer at ¶ 34)

58).

2. The requested documents showing IRS approval and qualification of the SuperMedia pension plans are encompassed by ERISA Section 104(b)(4).

In support of Count Two, plaintiffs pled they specifically requested from Defendant SuperMedia EBC but were denied copies of "documents reflecting application made to the IRS for approval of the transfer of retirees and pension assets and qualification of the pension plans, as well as letters and responses by the IRS" (Docket No. 6, Amended Complaint at ¶¶ 56, 86). In a single paragraph argument, Defendants mischaracterize and belittle plaintiffs' request as merely seeking "communications between the SuperMedia Defendants and the IRS" and, then, contend communications are not encompassed by ERISA Section 104(b)(4). (Docket No. 22 at p. 9).

The lone case cited in SuperMedia Defendants' memorandum brief is inapposite. In *Brown v. Am. Life Holdings, Inc.*, 64 F.Supp.2d 882 (S.D. Iowa 1998), the claimant asked generically for "all filing and correspondence to and from the Internal Revenue Service." *Id.* at 887. When ruling on the defendant's motion for summary judgment, the trial court determined the refusal to honor the plaintiff's request did not violate ERISA Section 104(b)(4) because written communications are not formal instruments under which the plan is established or operated. *Id.* at 890.

Here, unlike in *Brown*, plaintiffs requested documents which directly pertain to the establishment and operation of SuperMedia's pension plans. It cannot be disputed that each SuperMedia pension plan is operated allegedly as a tax qualified plan exempt from taxation

under IRC Section 401(a), 26 U.S.C. § 401(a).[4] Therefore, in their genesis, the SuperMedia pension plans had to be established with IRS approval and obtain a favorable determination letter by the Commissioner of Internal Revenue. ERISA Section 3001(a) states in pertinent part:

> Before issuing an advance determination of whether a pension, profit-sharing, or stock bonus plan, a trust which is part of such plan, ... the Secretary of the Treasury shall require the person applying for the determination to provide, in addition to any material and information necessary for such determination. . . .The Secretary of the Treasury shall also require that the applicant provide evidence satisfactory to the Secretary that the applicant has notified each employee who qualifies as an interested party)within the meaning of regulations prescribed under §7476(b) of such Code (relating to declaratory judgments in connection with the qualification of certain retirement plans)) of the application for a determination. [5]

29 U.S.C. § 1201(a). Although there are no published court cases directly on point, plaintiffs contend the application and any IRS determination letter indicating whether or not SuperMedia's pension plans qualified for the special tax treatment granted by the Internal Revenue Code constitute documents establishing the pension plans encompassed by ERISA Section 104(b)(4), and all such documents were wrongfully withheld by SuperMedia EBC.

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[4] Besides being a specific ERISA mandated requirement, there are numerous benefits if a pension plan receives a favorable IRS determination that the plan may be operated as "tax qualified" pursuant to I.R.C. § 401(a). SuperMedia, as employer and plan sponsor, is entitled to a deduction for contributions to a trust fund under its pension plans. I.R.C. §§ 401(a), 404. Plaintiffs and putative class members are not taxed on pension plan benefits until they actually receive the distributions. *Id*. § 402(a). As a general rule, the income derived from tax qualified plans will be exempt from corporate income taxation. *Id*. § 501(a). See *Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291, 293 (2d Cir.1994).

[5] Treas. Reg. § 1.7476-1(b)(1)(i) states that notice must be sent to "[a]ll present employees of the employer who are eligible to participate in the plan. . . " 26 C.F.R. § 1.7476-1(b)(1)(i). Sadly, no plaintiff or putative class member was notified, and they had no knowledge of the year 2006 establishment of SuperMedia's pension plans until after they had been involuntarily transferred out of Verizon's pension plans into SuperMedia's pension plans. (Docket No. 6, Amended Complaint at ¶¶ 45-46).

3. The requested investment policies/guidelines are encompassed by ERISA Section 104(b)(4).

In Count Two, plaintiffs specifically contend that the SuperMedia pension plans' investment policy guidelines constitute instruments under which the pension plans are established or operated within the meaning of ERISA Section 104(b)(4). (Docket No. 6, Amended Complaint at ¶ 106). Plaintiffs contend investment policy guidelines are the very type of documents contemplated by ERISA Section 104(b)(4), because their disclosure would allow "the individual participant [to] know [] exactly. . who are the persons to whom the management and investment of his plan funds have been entrusted." *Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 689 (9th Cir. 1995) (quoting S. Rep. No. 127, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4863). The Supreme Court has said that "it could be argued that. . .[a fiduciary] is obligated to disclose characteristics of the plan and of those who provide services to a plan, if that information affects beneficiaries' material interests." *Pegram v. Herdrich*, 120 S.Ct. 2143, 2154 n. 8 (2000).

But, Defendant SuperMedia EBC contends otherwise and relies exclusively on an unpublished ruling from the Northern District of Ohio, *Hickey v. Pennywitt*, 2004 WL 1304933 (N.D. Ohio 2004). In *Hickey*, the district court held that investment guidelines are not documents which provide a plan participant with information concerning how a plan is operated, and therefore are not subject to production pursuant to § 1024(b)(4). *Id.* at *7. The unpublished *Hickey* decision contradicts both an appellate court ruling and an interpretative bulletin by the United State Department of Labor.

At least one federal appellate court decision squarely supports plaintiffs' position. In

Faircloth v. Lundy Packing Co., 91 F.3d 648, 653 (4th Cir. 1996), *cert. denied*, 519 U.S. 1077, 117 S.Ct. 738 (1997), the Fourth Circuit held that "other instruments under which the plan is established or operated encompasses formal or legal documents under which a plan is set up or managed." Applying this standard, the Fourth Circuit ruled that the plaintiff plan participants were entitled to copies of the plan's funding and investment policies. *Id.* at 656.

While not specifically dealing with a request for investment guidelines, other appellate courts agree with the *Faircloth* court reasoning. See e.g., *Board of Trustees of the CWA/ITU v. Weinstein*, 107 F.3d 139, 142-143 (2nd Cir. 1997) (holding that the meaning of "instruments under which [a] plan is operated" found in ERISA § 104(b)(4) encompasses document that sets out rights, duties or obligations and documents that "confine a plan's operations."); *Shaver v. Operating Eng. Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003) (ruling that ERISA § 104(b)(4) "mentions only legal documents that describe the terms of the plan, its financial status, and other documents that restrict or govern the plan's operation"). The investment guidelines that plaintiffs requested actually govern and restrict the plan's operations. The requested investment guidelines meet the test of being one of the "documents which provide a plan participant with information concerning how the plan is operated." *Allinder v. Inter-City Products Corp (USA)*, 152 F.3d 544, 549 (6th Cir. 1998).

Further support for plaintiffs' position that the requested investment guidelines should have been disclosed to them is found within the Department of Labor's (DOL) Interpretative Bulletin 94-2, which is Exhibit 1 filed herewith.[6] In this Interpretative Bulletin, the DOL

[6] Admittedly, interpretive bulletins do not rise to the level of a regulation and do not have the effect of law. A court is not required to give effect to an administrative interpretation. See *Batterson v. Francis*, 432 U.S. 416, 425 n.9 (1977) (citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 231-37 (1974)). However, the DOL position

concludes that statement of investment policies and investment policy guidelines are documents and instruments governing a plan: The Interpretative Bulletin states, in pertinent part:

> For purposes of this document, the term "**statement of investment policy" means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions**. . . . [a] named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. . . **Statements of investment policy** issued by a named fiduciary authorized to appoint investment managers **would be part of the 'documents and instruments governing the plan'** within the meaning of ERISA §404(a)(1)(D).

(emphasis added) (Exhibit 1, 29 CFR § 2509.94-2).

In *Hickey*, the court, after quoting the *Faircloth* standard and not criticizing that standard, inexplicably failed to follow it. *Hickey*, 2004 WL 1304933 at *7. The *Hickey* decision also failed to consider the DOL's interpretative bulletin. Therefore, this Court should find the *Hickey* decision unpersuasive. See also *Phelps v. Qwest Employees Benefit Committee*, Not Reported in F.Supp.2d, 2005 WL 3280239 at *5 (D. Colo. December 2, 2005), wherein the court ruled a defined pension plan's investment guidelines are subject to production under ERISA Section 104(b)(4).

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as stated in an Interpretative Bulletin is entitled to deference because Congress specifically authorized the Secretary of Labor to interpret and enforce ERISA. *Hermann v. Nations Bank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997); *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir. 1993). The level of deference given to an interpretative bulletin is governed by the bulletin's persuasiveness. See *Reich v. Gateway Press, Inc*., 13 F.3d 685, 699 n.17 (3d Cir. 1994); *Goldberg v. Sorvas*, 294 F.2d 841, 847 and 847 n.11 (3d Cir. 1961). "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Overnight Motor Co. v. Missel*, 316 U.S. 572, 580-581 (1941).

Since plaintiffs pled in their Count Two and can prove that some of the requested information was required to be disclosed to them pursuant to ERISA Section 104(b)(4), the Court cannot dismiss the claim that Defendant SuperMedia EBC violated the statutory disclosure duty. Moreover, plaintiffs ought to have a reasonable opportunity to develop a full evidentiary record of all requested documents not disclosed. As observed by other courts, "the pleadings cannot support dismissal because the scope of 1024(b)(4) is fact dependent. Some of the documents [plaintiff] requested may ultimately be found to "formally govern the establishment of the plan." *Sheriff v. Bridgeford Foods Corp*., Not Reported in F.Supp.2d, 2009 WL 2972506 at *4 (N.D. Ill, September 9, 2009) (citing *Mondry v. Am. Fam. Mutual Ins*., 557 F.3d 781, 797, 800 (7th Cir. 2009)). Therefore, Defendant SuperMedia EBC's motion to dismiss Count Two should be denied.

D. Plaintiffs Have Stated a Claim Against SuperMedia EBC for Violation of ERISA § 404(a)(1)

In Count One, plaintiffs contend pension plan administrators (both Defendant Verizon EBC and Defendant SuperMedia EBC) breached fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), which statutory provision mandate that fiduciaries act in the best interests of plan participants. (Docket No. 6, Amended Complaint at ¶ 101). Pension plan administrators denied many of plaintiffs' requests for plan documents and other pension plan information, all of which information was necessary for plaintiffs' internal administrative claims asserted before filing this civil action. (*Id.* at ¶ 99). Plaintiffs contend that they can demonstrate circumstances which justify expansion of the pension plan administrators' respective duties to make required disclosures to plaintiffs beyond the matters specifically listed in ERISA Section

104(b)(4). (*Id.* at ¶ 95).

Defendant SuperMedia EBC has moved to dismiss Count One on the grounds that there can be no basis for plaintiffs' breach of fiduciary duty claim if the requested and withheld information is not specifically required to be produced pursuant to ERISA Section 104(b)(4). (Docket 23, at pp. 10-11). The lone court case decision cited in defendant's supporting memorandum brief is inapposite. In *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198 (9th Cir.2003), two participants requested and were denied detailed records of the pension plan's expenditures. The appellate court affirmed the trial court's determination that the requested receipts were not instruments under which the pension plan was operated and, therefore, need not be disclosed under ERISA Section 104(b)(4). *Id.* at 1202. Hence, there was no breach of fiduciary duty for failure to produce the requested receipts. *Id.* Mr. Shaver was not engaged in an internal claim concerning his status for payment of benefits and the information he requested would not have been pertinent to any such administrative claim had one been underway.

In stark contrast, the information denied by SuperMedia EBC to plaintiffs was requested in conjunction with plaintiffs' ongoing internal claims. Defendant SuperMedia EBC breached its fiduciary duty since the information defendant withheld was "pertinent documents," pursuant to ERISA Section 503(2), 29 U.S.C. § 1133(2), and the accompanying regulation 29 C.F.R. § 2560.503-1(g)(ii).[7] By Defendant SuperMedia EBC withholding the requested information,

[7] ERISA Section 503(2) provides, "[i]n accordance with regulations of the Secretary, every employee benefit plan shall ... afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2). The accompanying regulation states that any plan's review procedure must allow "a claimant [to] ... [r]eview pertinent documents." 29 C.F.R. § 2560.503-1(g)(ii).

plaintiffs were left to shoot at a cloaked target and could not deploy all possible arguments in order to meaningfully address the denial of their claim that all involuntarily transferred retirees be restored into Verizon's pension plans. Moreover, Defendant SuperMedia EBC completely breached its fiduciary duty to give plaintiffs and full and fair review of their administrative claim. Said defendant chose not to even respond to the merits of plaintiffs' administrative claim. (Docket No. 6, Amended Complaint at ¶¶ , 2, 63). Instead, more than six months after receiving plaintiffs' class-wide claim to be removed from SuperMedia's pension plans and returned to Verizon's pension plans, said defendant reported back to plaintiffs that "ERISA does not recognize such a claim." (*Id.* at ¶¶ 2, 60, 69). By refusing to give plaintiffs the requested information which was pertinent to plaintiffs' administrative claim, Defendant SuperMedia EBC made the internal claims process futile. (*Id*. at ¶ 75, 99, 101). In the pending motion to dismiss, said defendant doesn't even address this aspect of Count One.

Defendant SuperMedia EBC takes the position that, unless specifically listed within the ambit of ERISA Section 104(b), no document or related pension information need ever be disclosed to a requesting participant or beneficiary. It appears to be said defendant's position that, if, by withholding a requested document or pension related information, the plan administrator cannot be subjected to the monetary penalty of ERISA Section 502(c) - the per diem penalty of $110 [8] - it is totally appropriate for the plan administrator to frustrate the participant's and beneficiary's efforts to assure transparency concerning the pension plan.

The fact that Congress chose to limit the per diem penalty's application to particular

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[8] By regulation, the maximum permissible per diem penalty under section ERISA Section 502(c), 29 U.S.C. §1132(c)(1), was increased from $100 to $110 per day. 29 C.F.R. § 2575.502c-3.

documents should not relieve a plan administrator of the duty to make other requested disclosures when to make such disclosures would be in the best interests of plan participants. The Seventh Circuit has reasoned:

> If it had meant to require production of all documents relevant to a plan, Congress could have said so. This is not to say, of course, that companies have a permanent privilege against disclosing other documents. It means only that the affirmative obligation to disclose materials under ERISA, punishable by penalties, extends only to a defined set of documents.

Mondry v. American Family Mut. Ins. Co., 557 F.3d 781, 797 (7th Cir. 2009). While the Court may not have the power to impose a per diem penalty against SuperMedia EBC for withholding each separate responsive document and related pension information requested by plaintiffs, the Court certainly has the power to grant injunctive relief requiring said defendant to make the requested disclosures. In this civil action, plaintiffs have requested such injunctive relief. (Docket No. 6, Prayer at ¶¶ D-E).

In addition, as discussed in Section C hereinabove, since plaintiffs pled and can prove that some of the requested information was required to be disclosed to them pursuant to ERISA Section 104(b)(4), the Court cannot dismiss the claim that Defendant SuperMedia EBC breached fiduciary duties. Accordingly, Defendant SuperMedia EBC's motion to dismiss Count One should be denied.

E. Plaintiffs Have Stated a Claim Against SuperMedia EBC for Equitable Relief Under ERISA § § 502(a)(2) and (a)(3)

In Count Four, plaintiffs seek appropriate equitable relief against Defendant SuperMedia EBC in order to facilitate plaintiffs' transfer out of SuperMedia's pension plans back into Verizon's pension plans. (Docket No. 6, Amended Complaint at ¶ 138-140, Prayer at ¶¶ G.4,

G.5). In addition, Plaintiffs seek removal of all plan administrators who aided and abetted in the scheme to involuntary transfer plaintiffs into SuperMedia's pension plan. (*Id.*, Prayer at ¶ G.7).

That each plaintiff worked a lifetime to earn a secure vested service retirement pension will not be disputed. (*Id.* at ¶¶ 6, 8, 10). Verizon's pension plans provided for cliff vesting which gave an incentive for plaintiffs and putative class members to spend their entire careers with Verizon's predecessors. (*Id.* at ¶ 155). While the Verizon pension plans provided for the possibility of transfers of "assets" or "liabilities" out of the plans into other pension plan, there were no terms or rules permitting the involuntary transfer of persons who are neither intangible assets nor liabilities. (*Id.* at ¶¶ 42, 117). Defendant SuperMedia EBC fully recognizes that plaintiffs seek to rescind their involuntary transfers and it's simple position is that "ERISA does not recognize such a claim." (*Id.* at ¶ 69).

To the contrary, ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), allows participants and beneficiaries to sue for "equitable relief" for breaches of fiduciary duty and violations that cause them individual harm. *Varity v. Howe*, 516 U.S. 489 (1996), where the Supreme Court stated:

> [T]he statute authorizes "appropriate" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Id., 116 S.Ct. at 1079 (internal citations omitted).

In *Varity*, the plaintiffs were misled into *voluntarily* transferring out of their employer's sponsored employee benefit plans into the plans sponsored by a newly formed subsidiary. That

transaction turned out to be bad for the plaintiffs and they wanted to be restored to their former employee benefit plans. The Supreme Court observed, "[w]e are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Varity*, 116 S.Ct. at 1079.

Here, the situation is just as compelling as that situation in *Varity*. Here, plaintiffs and all putative class members were *involuntarily* transferred and notified after the fact of their change in status. Plaintiffs and putative class members want that transaction reversed. Just as in *Varity*, in this case, plaintiffs cannot obtain the remedy they seek via either ERISA Section 502(a)(1)(B), which provides for a recovery of unpaid benefits, or ERISA Section 409,which provides for recovery of losses to a pension plan. Granting plaintiffs the requested injunctive remedy, pursuant to ERISA Section 502(a)(3), is consistent with the Supreme Court's rulings in *Varity*.

In order for plaintiffs to obtain complete relief - removal from SuperMedia's pension plan and restoration into Verizon's pension plans - SuperMedia EBC, serving as plan administrator for all of SuperMedia's pension plans, is a necessary party for the same reasons argued in Section B hereinabove concerning the SuperMedia pension plans status as defendant parties.

Lastly, Defendant SuperMedia's argument that plaintiffs' claim for equitable relief must be dismissed because plaintiffs cannot presently meet the burden of proving a right to either a preliminary or permanent injunction is not only premature but misplaced. (See Docket 23 at p. 13 wherein said defendant argues "plaintiffs cannot show a likelihood of success on the merits of the claims they have asserted. . . so injunctive relief is available.") There is no pending motion

for either a preliminary or permanent injunction. Because plaintiffs have stated a claim for equitable relief which necessitates joinder of SuperMedia EBC as a defendant party, the motion to dismiss Count Four as to SuperMedia EBC should be dismissed.

III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, the Court should deny Docket No. 22, the SuperMedia Defendants' motion to dismiss. Due to the importance of the issues in this civil action, which case is being monitored by hundreds of putative class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful to the Court and is requested.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2010, a true and correct copy of the above and foregoing document, together with Exhibit 1, was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel as follows:

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